

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 25, 2006

ALMEER NANCE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 75969 Ray L. Jenkins, Judge

No. E2005-02265-CCA-R3-PC - Filed June 9, 2006

A Knox County jury convicted the petitioner, Almeer Nance, of felony murder, especially aggravated robbery, especially aggravated kidnapping, and aggravated robbery. The trial court sentenced the petitioner to an effective sentence of life with an additional twenty-five years. The petitioner was unsuccessful in his direct appeal to this Court. State v. Almeer Nance, No E2000-00170-CCA-R3-CD, 2001 WL 1268499 (Tenn. Crim. App., at Knoxville, Oct. 23, 2001), perm. app. denied (Tenn. March 11, 2002). On November 6, 2002, the petitioner filed a pro se Petition for Post-conviction relief. After appointment of counsel, the post-conviction court held a cursory hearing on September 16, 2005. At the conclusion of that hearing, the post-conviction court dismissed the petition for failure to prosecute. The petitioner appeals the dismissal of his petition. We reverse and remand the post-conviction court's dismissal of the petition.

Tenn. R. App. P. 3; Judgment of the Trial Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Almeer Nance.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leon Franks, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

This court summarized the facts in the underlying direct appeal:

Essentially, on January 16, 1996, the defendant and Robert Manning robbed at gunpoint Scott's Market in Knoxville. Two days later Manning picked up the defendant at the defendant's home. Amanda Goode accompanied the pair. In looking for a place to rob, the three finally came to a Radio Shack. Goode stayed in the car while Manning and the defendant, wearing toboggans/ski masks, entered the store. Both men were once more armed with guns, and in the process of the robbery, the store clerk, Joseph Ridings, was shot in the head. He subsequently died from this wound. Upon leaving the store, Manning and the defendant rejoined Goode in a stolen Mazda, and the trio drove from the scene. They then discovered a raised garage door at the home belonging to Arthur and Patsy Sipf. Again, Manning and the defendant exited the car. Finding the door from the garage to the living area of the home unlocked, the two proceeded into the house. Once more the pair donned toboggans/ski masks. They stole items from the home while holding both Sipfs on the floor at gunpoint. The offenders then forced the couple into the trunk of one of the Sipfs' cars. Having done so, Manning and the defendant left in an automobile belonging to the Sipfs. Goode continued in the Mazda. At this point we note that the defendant was apparently returned to his home. He was not convicted of any offenses committed after the encounter with the Sipfs.

State v. Almeer Nance, No E2000-00170-CCA-R3-CD, 2001 WL 1268499, at *1 (Tenn. Crim. App., at Knoxville, Oct. 23, 2001)(footnotes omitted), perm. app. denied (Tenn. March 11, 2002). As noted above, at the conclusion of the evidence, a jury convicted the petitioner of felony murder, especially aggravated robbery, especially aggravated kidnapping, and aggravated robbery. Id. at *3. The trial court sentenced the petitioner to an effective sentence of life with an additional twenty-five years. Id. at *1.

The petitioner filed a pro se Petition for Post-conviction Relief on November 6, 2002. Counsel was appointed for the petitioner on November 14, 2002. Following appointment of counsel, the petitioner filed a notice of intent not to amend his petition on March 28, 2003. The State filed an answer to the petition on April 3, 2003. Following a hearing held on September 16, 2005, the post-conviction court filed an order dismissing the petition for failure to prosecute.

The record in this case consists of the technical record and the transcript from the September 16, 2005 hearing. The transcript, in its entirety, reads as follows:

[Defense counsel]: Your Honor, Almeer Nance.

THE COURT: Yes.

[Defense Counsel]: Your Honor, if the Court remembers, the last time we were here, the Court bent over backwards to accommodate Mr. Nance. I believe his mother and sister were here, and they told the Court that they were in the process of hiring him an attorney, and the Court put it on today to see if they did.

I– your Honor– I’m

THE COURT: No– no–

[Defense Counsel]: – no, they haven’t hired any. I’ve not heard from anybody–

[Asst. District Attorney]: This is the one, Judge, that, when you called it up earlier, they’ve been saying this since August of last year–

[Defense Counsel]: Yeah.

THE COURT: Well–

[Asst. District Attorney]: –after they told the Court in November of 2004 that they’ve hired a lawyer, but haven’t told us who it was.

THE COURT: I’m sure the Court of Criminal Appeals won’t take an interest in this ruling, but it’s dismissed for failure to prosecute.

The post-conviction court’s order states:

A Petition for Post Conviction Relief was filed in this cause on November 6, 2002. On November 14, 2002, the Honorable Albert Newman was appointed by the Court to represent the defendant/petitioner. An Answer was filed by the District Attorney General on April 3, 2003. This cause therefore came on for hearing on September 16, 2005. The defendant/petitioner having failed to appear, it appears to the Court that the Petition should be dismissed for failure to prosecute.

IT IS HEREBY ORDERED that the Petition for Post Conviction Relief is hereby DISMISSED for failure to prosecute.

The petitioner filed a timely notice of appeal on September 21, 2005.

ANALYSIS

The petitioner argues that the post-conviction court erred in dismissing the petition on its own motion and that the findings of fact and conclusions of law were incorrect in its order. The State argues that the post-conviction court did set forth findings that support the dismissal for failure to prosecute the petition.

In Williams v. State, 831 S.W.2d 281 (Tenn. 1992), our supreme court stated that if a petitioner was “abusing the post-conviction process by filing successive petitions and seeking repeated withdrawals, or is otherwise acting in bad faith, dismissal of the action for failure to prosecute . . . would be proper.” Williams, 831 S.W.2d at 283.

We dealt with a similar issue to the issue in the case at hand in Charles Ritter v. State, No. E2003-03016-CCA-R3-PC, 2004 WL 2309140 (Tenn. Crim. App., at Knoxville, Oct. 14, 2004). In Charles Ritter, there was sparse transcript consisting of a brief transcript of a hearing and a few pleadings and court minutes in the technical record. Charles Ritter, 2004 WL 2309140, *1. The petitioner in that case had been through three attorneys appointed by the post-conviction court. Id. Upon the appointment of the third counsel and a subsequent amendment of the post-conviction petition, the State filed a motion to dismiss based on the fact that the case had been reset sixty-seven times and alleged that the petitioner was acting in bad faith. Id. The State relied upon our supreme court’s holding in Williams to support its argument. Id. Following a hearing, the post-conviction court dismissed the petition but “made neither oral nor written findings of fact or conclusions of law to explain its decision to grant the State’s motion.” Id. at *2. We decided that the post-conviction court erred in dismissing the petition without making findings of fact or conclusion of law to support its decision. Id.

In this case, we have a brief transcript of a hearing and a few pleadings. The argument at the hearing and the briefs on appeal reference the fact that the defendant wanted to hire his own attorney to replace appointed counsel and had delayed the time of the hearing. However, we do not have any evidence of these delays in the record. As we stated in State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988), “the arguments of counsel and the recitation of the facts contained in a brief, or a similar pleading, are not evidence.” Therefore, as in Charles Ritter, there is insufficient evidence in the record to support the post-conviction court’s decision. In addition, a post-conviction court must set forth its conclusions of law in an order when a post-conviction petition is dismissed without a hearing. Tenn. Code Ann. § 40-30-106(f). The post-conviction court did not make adequate findings of fact and conclusions of law to support its decision in this case.

For this reason, we have determined that the post-conviction court’s dismissal of the petition must be reversed.

CONCLUSION

For the foregoing reasons, we reverse and remand the judgment of the post-conviction court. Upon remand, the post-conviction court should conduct a hearing to determine whether the delay was caused by bad faith on the part of the petitioner. If the post-conviction court so determines, the petition may be dismissed for failure to prosecute.

JERRY L. SMITH, JUDGE